

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ELMERICO and BARBARA DESIDERIO,	:	
	:	
Plaintiffs,	:	Civil Action No. 2:06-cv-01189-JG
	:	
v.	:	
	:	
PAUL H. STEINFIELD, M.D.,	:	
	:	
Defendant.	:	

PLAINTIFFS' MOTION TO REMAND

Plaintiffs Elmerico Desiderio and Barbara Desiderio, by their undersigned counsel, move this Honorable Court to remand this action to the Court of Common Pleas of Philadelphia County, Pennsylvania, and aver the following in support hereof:

1. Plaintiffs instituted this medical malpractice action against defendant Paul H. Steinfield, M.D. by filing a writ of summons in the Court of Common Pleas of Philadelphia County, Pennsylvania on October 27, 2005.
2. Plaintiffs thereafter filed their complaint against defendant on December 16, 2005.
3. On or about March 20, 2006, defendant filed a notice of removal of the state court action to this Court on the basis of diversity of citizenship.
4. As alleged in plaintiffs' complaint and acknowledged in defendant's notice of removal, defendant is a citizen of the Commonwealth of Pennsylvania.
5. On March 21, 2006, after receiving defendant's notice of removal, plaintiffs' counsel promptly telephoned defense counsel and informed him that removal was improper inasmuch as defendant is a citizen of the forum state in the Pennsylvania action.

6. Plaintiffs' counsel offered to forego filing a motion to remand if defense counsel indicated by March 24, 2006 that the appropriate papers would be filed in this Court returning this case to state court.

7. Notwithstanding defense counsel's statement that he would get back to plaintiffs' counsel by March 24, 2006 (3 days after a courtesy call from plaintiffs' counsel) and defense counsel's acknowledgment that it "rings a bell" that a "home state" defendant cannot remove a case to federal court, defense counsel has failed to contact the undersigned or file the appropriate papers transferring this matter back to the Court of Common Pleas of Philadelphia County.

8. Section 1441(b) of Title 28 of the United States Code clearly prohibits removal on diversity grounds if any defendant "is a citizen of the State in which such action is brought."

9. Accordingly, plaintiffs file this motion to remand and respectfully request this Court to enter the proposed Order attached hereto, which Order includes -- pursuant to 28 U.S.C. § 1447(c) -- a provision requiring defendant to pay a nominal amount representing the costs incurred as a result of defendant's improper removal.

WHEREFORE, plaintiffs Elmerico Desiderio and Barbara Desiderio respectfully request this Honorable Court to grant their Motion to Remand and enter the proposed Order attached hereto.

SPRAGUE & SPRAGUE

By: /s/ Thomas A. Sprague
Thomas A. Sprague, Esquire

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Attorney for Plaintiffs

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**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION TO REMAND**

Facts

Plaintiffs incorporate by reference the facts set forth in the attached motion.

In summary, defendant has removed to this Court a medical malpractice action from the Court of Common Pleas of Philadelphia County, Pennsylvania despite the fact that defendant is a citizen of the Commonwealth of Pennsylvania. This is improper pursuant to 28 U.S.C. §1441(b).

Argument

Section 1441(b) of Title 28 of the United States Code flatly prohibits removal on diversity grounds if any defendant "is a citizen of the State in which such action is brought." *See Korea Exchange Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 48 (3d Cir. 1995). *See also Shapiro v. Logistec USA Inc.*, 412 F.3d 307, 312-313 (2d Cir. 2005).

Here, defendant is a citizen of the Commonwealth of Pennsylvania and is barred by Section 1441(b) from removing this action from his home forum.

WHEREFORE, plaintiffs Elmerico Desiderio and Barbara Desiderio respectfully request this Honorable Court to grant their Motion to Remand and enter the proposed Order attached hereto.

Respectfully submitted,

SPRAGUE & SPRAGUE

By: /s/ Thomas A. Sprague
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(215) 561-7681

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Thomas A. Sprague, Esquire, hereby certify that on this 27th day of March, 2006, I caused Plaintiffs' attached Motion to Remand, together with accompanying Memorandum of Law and proposed form of Order, to be filed and served via the Court's ECF system, where the documents are available for viewing and downloading. I further certify that copies of the documents referred to above were sent by United States First Class Mail, postage prepaid, to the following individual on the date indicated below:

Kyle N. Thompson, Esquire
Kilcoyne & Nesbitt, LLC
630 W. Germantown Pike, Suite 121
Plymouth Meeting, PA 19462

Attorney for Defendant Paul H. Steinfield, M.D.

/s/ Thomas A. Sprague
Thomas A. Sprague

Dated: March 27, 2006